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NO. 917

In the Supreme Court of the United States

WARDE H. ERWIN AND MARY LOU ERWIN,
Petitioners,

v.

RALPH C. GRANQUIST, District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARDE H. ERWIN,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-58

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Comes now your petitioner and respectfully petitions that a writ of certiorari issue from this court to the United States Court of Appeals for the Ninth Circuit to review the judgment entered in the above entitled cause.

OFFICIAL REPORTS OF DECISIONS BELOW

The judgment of the District Court of the District of Oregon is unreported officially. The judgment is appended.

The judgment of the Court of Appeals of the United States for the Ninth Circuit is officially reported at — F.2d —. The judgment is appended.

JURISDICTION OF THIS COURT

Judgment of the U.S. District Court for the District of Oregon, was entered on May 10, 1957. Judgement of affirmance was dated and entered by the U.S. Court of Appeals for the Ninth Circuit on February 13, 1958.

There has been no petition for rehearing. The case presents only questions of law.

Jurisdiction of this court is conferred by Title 28, Section 1254 (1) U.S. Code, Act of June 25, 1948, C 646, (1), 62 Stat. 928, as follows:

> "Case in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon petition of any civil or criminal case, before or after rendition of Judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

The sole question presented upon appeal to the Court of Appeals was whether or not the "Declaration of Estimated Income Tax" provisions of the Internal Revenue Code, of 1939 are constitutional. (Title 26, Section 58, U.S. Code, 1952 Ed. in full in appendix).

Constitutionality was attacked in the courts below upon the following grounds:

1. The act is in violation of Article I, Section 9 of the Constitution of the United States and is in conflict with the decision of this court in *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601, in that the tax:

a) is not a tax on "income" within the meaning of the 16th amendment to the Constitution;

b) is a direct tax within the holding in *Pollock v. Farmers Loan and Trust Co.*, 158 U.S. 601, and

c) is not apportioned as required in Article I, Section 9, paragraph 4 of the United States Constitution.

2. The Act is violative of the Fourth Amendment to the Constitution of the United States and is in conflict with the decision of this court in *Boyd v. United States*, 116 U.S. 616, in that

a) the Act compels an involuntary statement under penalties of perjury of a matter not yet in existence and is a "search" under the Fourth Amendment as held in *Boyd v. United States*, and

b) is an "unreasonable" search in that

(1) it requires a declaration as to something not yet in existence and which may never come into existence (future income) and future tax on such non-existent income;

(2) is not within the power of Congress to raise revenue because it does not provide any revenue. After the income has been produced and computed —the entire tax is paid and the tax is not due or assessed until that time.

(3) is not an information return because it requires no "existing" fact to be furnished and its purpose was not to secure information for any congressional purpose.

(4) Requiring a guess as to a future event which

may never occur under penalty of perjury is, itself, requiring an unconstitutional act in violation of the Fourth and Fifth Amendments, as held in *Boyd v. United States* (supra).

3. The Act is violative of the Fifth Amendment to the Constitution of the United States and is contrary to the decision of *Boyd v. United States* (supra) and *Slockhower v. Board of Education of New York City*, 350 U.S. 551, in that

a) It deprives a person of property without "due process" of law by requiring payment of a sum of money based on a "guessed amount" of future tax on income which may never come into existence and hence lacks the definiteness required of constitutional legislation, and

b) It violates the constitutional protection against "self incrimination" by requiring (by legislation) a "guess" as to non-existent fact under penalty or perjury without opportunity to claim the privilege prior to making the "guess."

The court of appeals found each of the foregoing contentions without merit or frivolous, and additionally held:

1. That the privilege against self-incrimination cannot be availed of unless a person is threatened or charged with a crime, and

2. That a person may be taxed upon income while "in the process" of earning or deriving that income.

The questions presented to this Court for review are:

1. Whether or not the decisions of the Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the District of Oregon is:

a) contrary to the constitutional provisions of Article I as modified by the Sixteenth Amendment to the Constitution of the United States;

b) contrary to the Fourth and Fifth Amendments to the Constitution of the United States, and

c) in conflict with the holdings of this court in the cases of *Pollock v. Farmers Loan and Trust Co.*, 158 U.S. 601; *Boyd v. U.S.*, 116 U.S. 616, and *Stockhower v. Board of Education of New York City*, 350 U.S. 551, and

2. Whether or not the judgment has determined a crucial and important question of Federal law which has not been, but should be settled by the court in that the court has held that a person can be taxed on income while he is in the "process" of earning income.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The "Declaration of Estimated Income Tax" provisions applicable are set out verbatum in the appendix.

Citations to the United States Code are:

Title 26, Section 58 (1952 ed), 57 Stat. 141, amended, 58 Stat. 242, 159 Stat. 559, 62 Stat. 113, 64 Stat. 544, 64 Stat. 945.

Title 26, Section 294 (1952 ed), 53 Stat. 88, amended 57 Stat. 144, 58 Stat. 37, 58 Stat. 235, 244, 59 Stat. 523, 64 Stat. 545, 64 Stat. 1136, 65 Stat. 465

2. Article I, Section 9, subparagraph 4 of the Constitution of the United States provides as follows:

> "No capitation or other direct tax shall be had, unless in proportion to the census or enumeration hereinbefore directed to be taken."

3. The Sixteenth Amendment to the Constitution of the United States provides as follows:

> "Income Tax. The Congress shall have power to lay and collect taxes on income, from whatever source derived without apportionment among the several states and without regard to any census or enumeration."

4. Title 26, Section 41, United States Code (1952 edition) 53 Stat. 24, provides as follows (pertinent parts only—in full in appendix):

> "The net income shall be computed upon the basis of the taxpayers annual accounting period (fiscal year or calendar year, as the case may be) . . .

5. Regulations—Internal Revenue Code 1939—Regulation 118, Section 39.41-1. (Pertinent part only—in full in appendix):

> "Net income must be computed with respect to a fixed period, usually that period is 12 months and is known as the taxable year . . . "

6. Regulations Internal Revenue Code 1939—Regulation 118, Section 39.58 (1) (Pertinent part only—in full in appendix):

> "For the purpose of making the declaration, the amount of gross income which the taxpayer can reasonably be expected to receive or accrue as the case may be, depending upon the method of accounting upon the basis of which net income is computed, and the amount of the Estimated allow-

able deductions and credits to be taken into account in computing the amount of "estimated tax" shall be determined upon the basis of acts and circumstances existing as at the time presented for the filing of the declaration."

7. The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no search warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

8. The Fifth Amendment to the Constitution provides as follows:

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

9. Title 26, Section 3809 U.S. Code 1952 Ed., Act of Aug. 27, 1949, C. 517, # 4 (a), 63 Stat. 667 provides in part (in full in appendix) as follows:

"Any person who willfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to

every material matter, shall be guilty of a felony, and upon conviction thereof, shall be fined not more than $2000, or imprisonment not more than five years or both."

STATEMENT OF THE CASE

This case presents only questions of law.

No facts were required to be determined in this case.

Taxpayers admitted earning taxable income for the tax year 1952 as finally determined in an amount which, if anticipated accurately, would have been sufficient to require filing an estimate of tax on such income if the provisions of Section 58 are constitutional and taxpayers further admitted that they failed to estimate the tax on such hypothetical income for the same tax year (1952).

The essential purpose of the case was to present to the court the question, "whether or not Section 58 of the Internal Revenue Code of 1939 (Title 26, Section 58, U.S. Code, 1952 Ed) is constitutional?"

The question was presented by petitioners (1) Claim for refund, (2) District Court complaint, (3) District Court pretrial order, (4) notice of appeal and (5) this petition (also by filing brief amicus curiae in *Dee Brown Walker v. U.S.*, 240 F.2d 601, certiorari denied, June 24, 1957, 354 U.S. 939).

JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the District Court for the District of Oregon was based on Title 28, Section 1340, U.S. Code (Congressional Act of June 25, 1948, C 646, 62 Stat. 932).

That act provides for the recovery of internal revenue taxes erroneously or illegally collected.

Appellants were assessed penalties under Section 294 of Title 26, U.S. Code (1952 ed.) for "failure to file a declaration of estimated tax" and for "substantial underestimate of tax."

Appellants paid the additional assessment on June 14, 1955, and filed a claim for refund on March 6, 1956.

After more than six months had elapsed without approval or denial of the claim or refund, action for recovery of the penalties was commenced in the United States District Court pursuant to authority of Section 6532, Title 26, U.S. Code (1954 Ed.), 68A Stat. 816.

The district court entered judgment in favor of taxpayer as to the penalty for "substantial underestimate" of estimated tax, but held that Section 58 (requiring the filing of an estimated tax on estimated income) was constitutional and the "failure to estimate" penalty to be therefore properly assessed.

Taxpayers appealed from the judgment and assigned as error the court's holding that Section 58 was constitutional.

The defendant-collector cross-appealed from the judgment but abandoned its cross-appeal.

The only question presented to the appellate court was the constitutionality of Section 58, and the penalty provisions of Section 294 of the Internal Revenue Code of 1939 (Title 26, Sections 58 and 294 U.S. Code).

ARGUMENT AMPLIFYING REASONS FOR WRIT OF CERTIORARI

I.

The Court of Appeals' Decision Is Contrary to Article I, Section 9 of the Constitution of the United States and Is in Conflict with the Decisions of This Court in Pollock v. Farmers Loan & Trust Co., 157 U.S. 429.

Article I of the Constitution provides that direct taxes must be apportioned. *Pollock v. Farmers Loan & Trust Co.* holds that a tax such as the income tax is a direct tax and must be apportioned. The Sixteenth Amendment, however, provides that a tax may be levied upon "income" without apportionment.

If the provisions of Section 58 provide for a tax on "income" the tax would be a direct tax but would be within the Sixteenth Amendment and would not need to be apportioned.

Section 58 does not, however, levy a tax on "income."

The court of appeals holds that it is a tax on a person "*in the process*" of earning income.

There is no "income" in existence when the estimate and payment is compelled to be made. Income requires the passage of an interval of time, for its existence.

The regulations state (Regulation 118, Section 39, 41-1) that net income "*must*" be computed with respect to a fixed period.

There may never be any "income." There may be no tax.

A tax on an individual in the "process" of earning income is a direct tax.

Since the tax is not on "income" it does not come within the 16th Amendment.

Since it is a direct tax as disclosed by this court's holding in *Pollock v. Farmers Loan & Trust Co.*, it is in violation of Article I, Section 9 of the Constitution for lack of apportionment.

The provision of the Sixteenth Amendment cannot be extended by loose construction. *Eisner v. MacComber*, 252 U.S. 189.

II.

The Decision of the Court of Appeals Is Contrary to the Fourth Amendment to the Constitution of the United States and It Is in Conflict with the Decision of This Court in Boyd v. United States, 116 U.S. 616.

The court of appeals holds that

> "The contentions as to self-incrimination and unreasonable searches and seizures appear to us to be frivolous."

Boyd v. United States held unconstitutional a statute which provided that where a proceeding arose under the revenue laws of the United States and was *non-criminal in nature*, the district attorney could demand production of any paper, business record, or invoice, which would tend to prove any allegation made by the United States and could offer the same in evidence on behalf of the United States (Laws of June 22, 1874, 5th Section).

In the Boyd case, the statute was attacked as a violation of the 4th and 5th Amendments to the Constitution.

This court in *Boyd v. United States* did not find, as did the court of appeals, that such contentions were frivolous but, on the contrary, found the case raised a "very grave question of constitutional law, involving personal security and privileges and immunities of citizens" and declared the Act unconstitutional.

Boyd v. United States held that the compulsory production of a man's property and papers to forfeit his property was a "search within the meaning of the Fourth Amendment and an unreasonable search as well and stated (p. 631):

> "And any compulsory discovery by extorting the party's oath or compelling production of his private books and papers to convict him of a crime or to forfeit his property is contrary to the principles of free government. It is abhorent to the instincts of an Englishman, it is abhorent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

The statute which the Boyd case held to be unconstitutional required only the production of "existing" documents. The only penalty for refusal was that the affirmations of the district attorney of what the document contained would be deemed to be true.

Section 58 doesn't require production of anything in existence but forces a "written estimate" under penalty of perjury of a tax on something which the tax-

payer doesn't own and is not in his possession and may never come into his possession.

The Court in *Boyd v. United States* held (p. 621):

> "That is so; but it (the statute) declares that if he does not produce then the allegation which it is affirmed, they will prove shall be taken as confessed. This is tantamount to compelling their production. . . . It is our opinion therefore that compulsory production of a man's private papers to forfeit his property is within the scope of the Fourth Amendment to the Constitution."

If the production of documents actually in existence under penalty of having a statement of the documents content declared to be true is a violation of the Fourth and Fifth Amendments, it is clear that a statute which not only compels a man to guess as to whether he will have taxable net income twelve months later, but also forces him to guess what the tax on that income will be and even worse, compels him to guess accurately and penalizes him if he fails, and further requires the guess to be made under penalties of perjury is even more obviously incriminating and hence unreasonable as determined by Boyd (pages 634-635).

III.

The Court of Appeals' Decision Is Contrary to the Fifth Amendment to the Constitution of the United States and Is In Conflict with the Holding of the Court In Boyd v. United States and Shelbourne v. Board of Education of New York City, 289 U.S. 351, on to Self Incrimination.

Section 58 provides an individual must guess what the tax on his income will be for the next 12 months'

period under penalty of perjury. Petitioners have labeled this as "statutory self incrimination."

The court of appeals decision holds that:

> ". . . as for appellants complaint about perjury, he is not charged or threatened with any such thing and the court will not pass upon the complaint of one who fails to show he is injured by its operation."

Petitioners concede that no prosecution for perjury have been filed against petitioners. No return of estimate was filed; hence no "statement was filed under penalties of perjury" (Title 26, USC Section 3809) which could be the subject of a perjury proceeding.

Only by failing to file a return could petitioner claim the privilege. The statute itself "threatens action for perjury" and in this respect the decision of the court of appeals is erroneous because taxpayer was threatened with perjury by the terms of the statute.

In *Boyd v. United States*, the statute applied only to "non criminal" cases and the proceeding specifically stated that the action was "not for penalties."

But the court held that the Fourth and Fifth Amendments almost run one into the other and when the ultimate result was deprivation of plaintiff's property, both the Fourth and Fifth Amendment applied and stated (p. 633):

> ". . . we have to deal with an Act which expressly excludes criminal proceedings from its operation though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding and neither therefore within the literal terms of the Fifth Amendment to the

> Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibition of either? We think not: we think they are within the spirit of both."

The court pointed out that while the proceeding was non-criminal that by another section any fraudulent act might be subject to fine and imprisonment and that the compulsory production was within the protection of the Fifth Amendment.

In Stockhower, this court pointed out that no criminal charge need be pending to invoke the privilege. The court said at page 557:

> "As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The *Ullmann* case, 350 U.S. 422, re-affirmed *Brown v. Walker*, 161 U.S. 591 and *Boyd v. United States* (supra) and *Stockhower* re-affirmed *Brown v. Walker* and cited *Quinn v. United States*, 349 U.S. 155.

In Ullmann, this court held (p. 438):

> "For the history of the privilege, established not only that it is not to be interpreted literally but also that the sole concern is as to its scope is to avoid, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts,' *Boyd v. United States*. We leave *Boyd v. United States* unqualified, as it was left unqualified in *Brown v. Walker*."

There can be no doubt that the penalties of both fine and imprisonment for perjury (Title 26, Section 3809

U.S. Code) would, of necessity, be based on the "taxpayer's own guessed tax."

The court of appeals decision holding that the court will not pass on the contention of "self incrimination" because petitioners were not charged nor threatened with perjury is contrary to both Boyd and Slochower decisions and is contrary to the fact.

IV.

The Court of Appeals' Decision Is Contrary to the Fifth Amendment to the Constitution of the United States as to "Due Process."

The court of appeals decisions holds:

> Appellant says Section 58 is unconstitutional because it violates the Fifth Amendment because its requirement of a guess by the taxpayer imports fatal uncertainty into the law . . . we find their contention without merit."

It would not be helpful to this court in determining whether or not certiorari be granted to cite or quote from the various decisions of this court in which "due process" has been defined and discussed.

This court is fully committed to the proposition that "due process' will be reviewed upon the actual situation of each case within the narrow confines of judicial judgment in an empiric process recognizing both past precedents and cutting a channel for what is to come.

No piece of legislation has been found by the writer, which is directly comparable to the statute under consideration and which has been tested for "due process."

Carefully selected comparisons might be helpful in brief upon the merits, but would seem to the writer to be inappropriate, unless factually exact for the purpose of this petition.

The principle is, however, clearly recognized in *Tyler v. United States*, 281 U.S. 497 where the court stated:

> "The possibility that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded."

The lack of "due process" in Section 58 is based upon the lack of definiteness and certainty which is a basic ingredient in a citizen's right to be ruled by "law" and not by "man."

The return fulfills no legislative purpose as a revenue measure because it produces no revenue and was not intended to produce revenue. The tax (if any is later found owing) is due and paid after the calendar year has passed (Title 26, Section 41, and Regulations 118, Section 39.41-4). The return required is not a so-called "information return" because there is no income in existence; no tax is due at the time the return is filed; and the return therefore imports no "factual" information.

Compulsory payment of money in anticipation of something which may never come into existence is both arbitrary and capricious.

The only standards or limitations fixed by Section 58 for determination of whether or not a person is com-

pelled to make the guess is whether he "reasonably expects" to earn or receive a stated amount of "gross income" within the next twelve months.

If it can be said by the director or his delegate that the taxpayer "reasonably expected" to receive a "gross income" in excess of the stated amount, then the taxpayer is compelled to make a guess as to his "expected income."

The statute contains no definition of reasonableness.

Determining "net income" requires a mental finding that the taxpayer "guessed" correctly about his earnings, his expenses, inventories, salaries, depreciation, bad debts, gain or loss from sales of property, commissions, profits or losses on contracts, whether or not dividends will be declared on stock owned, whether debts will be repaid, fluctuations of the market price for goods produced, whether his wife or children will be employed, whether he will have good or poor success on "contingent fee" cases, whether he will maintain good or poor health, the amount and cost of travel, whether income producing properties will be fully or partially occupied or converted to business purposes during the coming year, amounts of interest on borrowed money if he decided to borrow, whether he will purchase a new automobile during the year or wait, whether or not certain types of business insurance will be procured, whether or not fringe benefits will be furnished to employees (profit sharing, hospital and sickness, retirements, etc.), whether conventions or meetings will be attended, periodicals or technical books purchased and

additionally must determine whether his partner or joint venturer is going to incur the same obligations or expenses or have the same or different success with litigation, contingent fees, etc., ad infinitum.

If we assume that the revenue agent can mentally determine that the taxpayer correctly guessed his "net income" then he determines whether the taxpayer correctly computed the "tax" on the net income. If he thinks the taxpayer did correctly "guess" both the net income and the tax, he must then find out whether the taxpayer correctly "guessed" which quarter of the year he would receive both the income and the deductions (294(d)(1)(A).

If he determines that all this was correctly done, no penalties nor perjury prosecution would be made, but if any part is wrong, then he assesses a penalty (294(d)(1)(B).

The penalties are assessed on the basis of a percentage of the tax as finally determined and reported 12 months later, but the regulation (39.58(b)-1) provides that the determinations shall be made:

> "Upon the facts and circumstances existing as at the time prescribed for the filing of the declaration."

Section 294(d)(2) removes the "substantial underestimate" penalty if the estimate equals the previous year's tax based on current year's exemption and credit for dependents.

This section does not eliminate the compulsory estimate under penalty of perjury.

It merely eliminates an "underestimate" penalty if the tax equals the previous year's tax.

A taxpayer could be guilty of perjury (assuming constitutionality) and still not incur a "substantial underestimate" penalty.

That means that the taxpayers "State of Mind" based on his hopes and aspirations, or pessimism at the time of the estimate should be the basis for the determination. Such a basis should, therefore, be sufficient to relieve against the imposition of the penalty or prosecution for perjury but the taxpayer must be willing to fight to secure its removal against a presumption that the collector's guess is correct. Imposition of the penalty is left to the whim of the collector.

Now, in addition, if the agent decides that because a taxpayer received a "substantial amount" or even a "small amount" of money (depending on the affluence of the agent) during the year and failed to guess the deductions or guessed "wrong" (in the mind of the agent) then he is faced with the charge of "perjury" for willfully making a false "estimate."

In defending against this charge if his hopes, aspirations, or feelings of financial defeat can be considered by the jury, he will be freed, but the prosecution is going to be based on his "written estimate" as compared with "final tax return" both prepared by his own hand.

The penalty imposed here for failure to estimate is asserted against both husband and wife. Under Oregon

law the income and property of the wife is separate from that of her husband.

It would be most arbitrary and capricious to assess a penalty against the one person for failure to guess another person's income even though it be husband and wife or even partners.

Yet the penalty for failure to file is based on the joint return of both husband and wife although the wife may have had no income. Thus, a wife with no "gross income" and who is therefore not even required to file an estimate and who has refused to do so is assessed a "joint and several" penalty based on an election which is exercised 12 months later when the return of tax is filed in regular course.

This would seem to make the wife's income that of her husband and vice versa for the purpose of estimating income, and would violate the due process clause as stated by this court in *Harper v. Tax Commission*, 284 U.S. 206.

Section 58 (c) which "permits" the filing of a joint estimate does not apply where no estimate is made.

None of the foregoing imparts "due process" or any "process."

It is believed that this statute presents a situation where not only the "unreasonable search" provisions of the Fourth Amendment but also the "self incrimination" provisions and the "due process" clause of the Fifth Amendment all "run into each other."

Regulation 39.58(b)-1 reflects clearly this uncertainty. It states in part:

> "In the case of taxpayer engaged in business on his own account, there shall be made an estimate of gross income and deductions and credits in the light of the best available information affecting the trade, business or profession."

The definiteness and certainty required of legislation under the due process clause is completely lacking in Sections 58 and 294.

That the Act deprives a person of his property seems too obvious for discussion—*United States v. Ohio Oil Co.*, 234 U.S. 548, 563.

V.

The Court of Appeals Has Determined an Important Matter of Federal Law Which Has Not Been but Should Be Settled by This Court.

The court of appeals has held:

> "We know of no reason why Congress may not require those who are in the process of earning or deriving income to file information returns or to pay currently installments of the tax based on those returns."

The court has therefore put its constitutional approval on the taxing of an individual while in the "process" of earning income.

While this has previously been discussed in relation to specific provisions, the holding of the court of appeals is such a violent and revolutionary holding as to require the attention of the bench and bar.

The principles of taxation have always been considered on the basis of either the "use" of property

or the "existence" of property or the "transfer" of property and reasonable certainty is essential to "due process" (*Edwards v. Slocum*, 264 U.S. 61).

Taxation of property "in anticipation" if it is to receive judicial sanction is so closely connected with the personal security and private rights of every citizen that it should receive the review of this court before it is permitted to stand as the law of the land.

Perhaps the period in which the legislation was passed should command this court's attention (1943).

In *Boyd v. United States*, it was stated on page 621:

> "It was the first legislation of this kind that ever appeared on the statute book of the United States, and as seen from its date (1874) was adopted at a period of great national excitement when the powers of the Government were subjected to a severe strain to protect the national existence."

It may be that this Act too was passed at a time of national excitement, and should be reviewed in the calm of more normal conditions.

OPINIONS OF COURTS BELOW

Findings and conclusions were entered in the district court and are printed herewith. The judgments of both the district court and court of appeals are printed as follows:

WARDE H. ERWIN and MARY LOU ERWIN

v.

RALPH C. CRANQUIST, District Director

(U.S. District Court of Ore., No. 8814, May 10, 1957)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried before the Court sitting without a jury on April 26, 1957. Upon consideration of the pretrial order entered herein, the evidence and arguments of the parties submited at the trial, the Court makes the following:

FINDINGS OF FACT

1. This is a suit for the refund of income taxes for the year 1953 alleged to have been erroneously assessed and collected by the defendant as District Director of Internal Revenue from the plaintiffs in the amount of $518.81.

2. On or about March 15, 1953, the plaintiffs filed their 1952 income tax return on the cash, calendar year basis, on which they paid the tax shown due thereon. They filed no declaration of estimated tax for 1952, as required by Section 294(d)(1)(A) of the Internal Revenue Code of 1939. Subsequently, the Commissioner

of Internal Revenue made a deficiency assessment of income taxes in the amount of $307.06, penalties of $171.00, and interest in the amount of $40.15, making a total of $518.81.

3. The deficiency assessment was based upon the disallowance of a capital loss claimed by plaintiffs in the amount of $1,000 on certain stock in a corporation known as Aladdin Recording, Incorporated, on the basis that the stock loss did not occur in 1952 but in 1953 when the corporation went in to bankruptcy; upon the further disallowance of claimed expenses for entertaining for business and professional purposes by the plaintiffs at the Multnomah Athletic Club in the amount of $200, out of a total claimed on their return of $795.00; and on the further basis of a disallowance of telephone calls made from the plaintiffs' residence. In this suit the plaintiffs have abandoned their claim relating to disallowance of the telephone expense.

4. Besides the deficiencies in tax mentioned above, the Commissioner of Internal Revenue assessed a penalty of $102.60 for failure to file a timely declaration of estimated tax for 1952, under the provisions of Section 294(d)(1)(A) of the Internal Revenue Code of 1939, and a further penalty of $68.40 for substantial underestimate of estimated tax, pursuant to Section 294(d)(2) of the 1939 Code. The plaintiffs paid these amounts.

5. Thereafter plaintiffs filed a timely claim for refund of the tax deficiency, penalties and interest, followed by this suit.

Plaintiffs' stock in Aladdin Recording, Inc., was purchased on or about November 15, 1952. The corporation continued to operate into 1953 and it went into bankruptcy in May of 1953. Plaintiffs have failed to show any identifiable event evidencing that this stock became worthless in 1952.

7. The Multnomah Athletic Club is primarily a social club, and plaintiffs have failed to prove that expenses beyond those allowed by the Commissioner were incurred for business purposes.

8. In this suit plaintiffs contend that, aside from that portion of deficiency based on the disallowed telephone expenses, the other deficiencies were erroneous; they further contend that imposition of the two penalties for failure to file a declaration of estimated tax and for substantial underestimate of estimated tax is inconsistent and, therefore, illegal; and lastly, they contend that the provisions of the Internal Revenue Code requiring the filing of a declaration of estimated tax and the imposition of penalties for violation of the statute is unconstitutional. They stated at the trial that they do not contend there was reasonable cause for their failure to file a declaration of estimated tax and I find that there was reasonable cause for their not filing a declaration.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action and the parties to it. The plaintiffs have the burden of proving that assessment and collection of the tax, penalties and interest herein sued for was erroneous.

2. Section 58 of the Internal Revenue Code of 1939, which for the year here in suit required the filing of a declaration of estimated tax by a taxpayer on or before March 15th of 1952, is constitutional as a valid exercise of the taxing power accorded the Congress under the Constitution.

3. Where no declaration of estimated tax is filed, the penalty for substantial underestimate of estimated tax under Section 294(d)(2) of the Internal Revenue Code of 1939 may not be imposed in addition to the penalty for failure to file an estimate under Section 294(d)(1)(A) of the Internal Revenue Code of 1939. Since no declaration was filed in this case, I find that the penalty for failure to file is appropriate here.

4. Plaintiffs are not entitled to a deduction for a capital loss on stock in Aladdin Recording, Inc. in 1952.

5. Plaintiffs' additional claimed expenses for entertaining at the Multnomah Athletic Club are not deductible as ordinary and necessary business expenses.

6. Upon presentation of an appropriate order, judgment will be entered for plaintiffs in the amount of $68.40, together with interest as provided by law.

/s/ CLAUDE McCULLOCH
United States District Judge

JUDGMENT AND ORDER

This cause came on for hearing before the court sitting without a jury on April 26, 1957. Upon consideration thereof, and the court having entered its

findings of fact and conclusions of law herein on May 10, 1957, it is

Adjudged, Ordered and Decreed that plaintiffs recover of defendant the sum of $68.40, together with interest as provided by law.

The Court certifies that there was probable cause for the acts of defendant in demanding and collecting from plaintiffs the penalty for refund of which this judgment is entered.

So ordered this 10th day of May, 1957.

/s/ CLAUDE McCULLOCH
United States District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Warde H. Erwin and Mary Lou Erwin, *Appellants*

vs.

Ralph C. Cranquist, District Director of Internal Revenue, *Appellee.*

No. 15,620
Feb. 13, 1958

Upon Appeal from the United States District Court for the District of Oregon.

Before HEALY, POPE and LEMMON, Circuit Judges.

PER CURIAM.

Appellants sued to recover various penalties assessed against them, including one for failure to file a declaration of estimated tax on time. The basis for this claim,

is that §58 Title 26 USC (1939 R.C.), requiring declaration of estimated tax by individuals, is unconstitutional and void, as is also that part of §294 of the same Code, which prescribes penalties for failure to file such declaration or pay the installments thereof.

Appellant says §58 is unconstitutional: (a) because when the return is required (April 15) there has been no income. All taxpayer has is a guess as to what the income for the year will be; and since there is then no income, the tax is not authorized by the Sixteenth Amendment; hence such a tax cannot be collected for it is not apportioned as required by Pollock v. Farmers Loan & Trust Co., 159 U.S. 601; (b) because it violates the Fifth Amendment in requiring self-incrimination, and also because its requirement of a "guess" by the taxpayer imports fatal uncertainty into the law; and (c), because the same requirement of a "guess", under pains of perjury, amounts to an unreasonable search and seizure contrary to the Fourth Amendment.

We find these contentions without merit. The Sixteenth Amendment's grant of power "to lay and collect taxes on incomes", gave Congress power to accomplish that end by "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited." McCulloch v. Maryland, 4 Wheat. 316, 421. They "pay-as-you-go" provisions of §58 are such means. They are appropriate measures for the convenient collection of the income tax. We know of no reason why Congress may not require those who are in the process of earning or deriving income to file returns, or to pay currently installments of tax based on those returns.

The contentions as to self-incrimination and unreasonable searches and seizures appear to us to be frivolous. As for appellant's concern about perjury, he is not charged or threatened with any such thing, and "The court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." (Mr. Justice Brandeis, Concurring, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347.)

The judgment is affirmed.

(Endorsed:) Per Curiam Opinion. Filed Feb. 13, 1958.

Paul P. O'Brien, Clerk

Respectfully submitted,

Wayne H. Erwin,
In propria persona, and attorney
for Mary Lou Erwin.

APPENDIX

26 U. S. C. Sec. 58

Declaration of estimated tax by individuals.

(a) *Requirement of declaration.* Every individual [other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable, but including every alien individual who is a resident of Puerto Rico during the entire taxable year] shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year, if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in Section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

(b) *Contents of declaration.* In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source and without regard to the tax imposed by subchapter E on self-employment income;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

(c) *Joint declaration by husband and wife.* In the case of a husband and wife, a single declaration under this section may be made by them jointly, in which case the liability with respect to the estimated tax shall be joint and several. No joint declaration may be made if either the husband or wife is a nonresident alien. If a joint declaration is made but a joint return is not made for the taxable year, the estimated tax for such year may be treated as the estimated tax of either the husband or the wife, or may be divided between them.

(d) *Time and place for filing.*

(1) *In general.* The declaration required under subsection (a) shall be filed on or about March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the tax-

able year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

(2) *Amendment of declaration.* An individual may make amendments of a declaration filed during the taxable year under this subsection, under regulations prescribed by the Commissioner with the approval of the Secretary. If so made, such amendments may be filed on or before the fifteenth day of the last month of any quarter of the taxable year subsequent to that in which the declaration was filed and in which no previous amendment has been filed, except that in the case of an amendment filed after September 15 of the taxable year, it may be filed on or before Jnanry 15 of the succeeding taxable year. Declarations and amendments thereof shall be filed with the collector specified in section 53(b) (1).

(3) *Return as declaration or amendment.* If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the pur-

poses of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

(c) *Extension of time.* The Commissioner may grant a reasonable extension of the time for filing declarations and paying the estimated tax, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(f) *Persons under disability.* If the taxpayer is unable to make his own declaration, the declaration shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(g) *Signature presumed correct.* The fact that an individual's name is signed to a filed declaration shall be prima facie evidence for all purposes that the declaration was actually signed by him.

(h) *Publicity of declaration.* For the purposes of section 55 (relating to publicity of returns), a declaration of estimated tax shall be held and considered a return under this chapter. June 9, 1943, 7 p. m., E. W. T., c.

120, § 5(a), 57 Stat. 141, amended May 29, 1944, 7 p. m., E. W. T., c. 210, Part I § 13(a), 58 Stat. 242; Nov. 8, 1945, 5:17 p. m., p.m., E. S. T., c. 453; Title I, § 102(b) (4), 59 Stat. 559; Apr. 2, 1948, 3:18 p. m., E. S. T., c. 168, Title II, § 202(a), 62 Stat. 113, Aug. 28, 1950, c. 809, Title II, § 208(d) (4), 64 Stat. 544; Sept. 23, 1950, 3:15 p. m., E. D. T., c. 994, Title II, § 221(g), 64 Stat. 945.

26 U. S. C. Sec. 294

Additions to the tax in case of nonpayment.

(a) *Tax shown on return.*

(1) *General rule.* Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

(2) *If extension granted.* Where an extension of time for payment of the amount so determined as the tax by the taxpayer, or any installment thereof, has been granted, and the amount the time for payment of which has been extended, and the interest thereon determined under section 295, is not paid in full prior to the expiration of the period of the extension, then, in lieu of the interest provided for in paragraph (1) of this subsection, interest at the rate of 6 per centum per annum shall be collected on such unpaid amount from the date of the expiration of the period of the extension until it is paid.

(3-5) Omitted. Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, §118(a), 58 Stat. 37.

(b) *Deficiency.* Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of jeopardy bond.* If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

(d) *Estimated tax.*

(1) *Failure to file declaration or pay installment of estimated tax.*

(A) *Failure to file declaration.* In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added

to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

(B) *Failure to pay installments of estimated tax declared.* Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subpara-

graph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.* If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60 (a), or 66-2/3 per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year [or in the case of farmers exercising an election under section 60 (a), within the last quarter] in an amount of at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on

his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66-2/3 per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuls imposed by the Revenue Act of 1951.

(3) *Tax on self-employment income.* This subsection shall be applied without regard to the tax imposed by subchapter E, relating to tax on self-employment income.

(e) *Substantial Overstatement of Expected Carry-Backs.* If the time for payment of any tax or taxes for any taxable year is extended under section 3779, there shall be added to such tax or taxes an amount equal to 5 per centum of the penalty portion, if any, of the amount to which such extension relates, unless the taxpayer establishes to the satisfacton of the Commissioner that, as of the end of the taxable year in which such extension was made, there was reasonable cause to expect there would be no such penalty portion. The penalty portion shall be the excess of the amount to which such extension relates which is not paid by the end of the

taxable year in which such extension is made over 125 per centum of the amount to which such extension relates which is satisfied by applying thereto a decrease in tax in respect to an application under section 3780(a) less any amounts assessed in respect of such application which are not so satisfied. 53 Stat. 88, amended June 9, 1943, 7 p. m., E. W. T., c. 120, § 5(b), 57 Stat. 144; Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, § 118(a), 58 Stat. 37; May 29, 1944, 7 p. m., E. W. T., c. 210, Pt. I, §§ 6(b), (8), 13(b), 58 Stat. 235, 244; July 31, 1945, c. 340, § 4(b), 59 Stat. 523; Aug. 28, 1950, c. 809, Title II, § 208(d) (8), 64 Stat. 545; Jan. 2, 1951, c. 1195, § 2, 64 Stat. 1136; Oct. 20, 1951, 2:07 p. m., E. S. T., Title I, § 103(b), 65 Stat. 465.

26 U. S. C. Sec. 41

Part IV—Accounting Periods and Methods of Accounting.

§ 41. General rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. 53 Stat. 24.

Regulation 118, Code Sec. 41

§ 39.41-4 Accounting period

The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not established a fiscal year. (See section 48.) The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December. No fiscal year will, however, be recognized unless before its close it was definitely established as an accounting period by the taxpayer and the books of such taxpayer were kept in accordance therewith. A person having no such fiscal year must make his return on the basis of the calendar year. Except in the case of a first return for income tax a taxpayer shall make his return on the basis upon which he made his return for the taxable year immediately preceding, unless, with the approval of the Commisisoner, he has changed his accounting period.

Regulations 118, Code Sec. 58(b)

§ 39.58 (b)-1 Form and contents of declaration of estimated tax.

(a) In general. (1) The declaration of estimated tax shall be on Form 1040—ES. The form may be obtained from the district directors of internal revenue of the several districts. It shall be executed, verified, and filed in accordance with the regulations in this part and the instructions on the form or issued therewith. For the purposes of making the declaration, the amount of gross income which the taxpayer can reasonably be expected

to receive or accrue, as the case may be, depending upon the method of accounting upon the basis of which the net income is computed, and the amount of the estimated allowable deductions and credits to be taken into account in computing the amount of the estimated tax, shall be determined upon the basis of facts and circumstances existing as at the time prescribed for the filing of the declaration. If, therefore, the taxpayer is employed at the date of filing his declaration at a given wage or salary, it should, in the absence of circumstances indicating the contrary, be presumed by him for the purposes of the declaration that such employment will continue at the end of the taxable year at the wage or salary received by him as at the date of making the declaration. In the case of the recipient of income other than wages the regularity in the payment of income, such as dividends, interests, rents, royalties, and income arising from estates and trusts is a factor to be taken into consideration. Thus, if the taxpayer owns shares of stock in the X Corporation and dividends have been paid regularly for several years upon such stock, the taxpayer in the preparation of his schedules preliminary to the execution of Form 1040-ES should, in the absence of information indicating a change in the dividend policy, include the prospective dividends from the X Corporation for the taxable year as well as those actually received in such year prior to the filing of the declaration. In the case of a taxpayer engaged in business on his own account, there shall be made an estimate of gross income and deductions and credits in the light of the best available information affecting the trade, business, or profession.

(2) In the case of any individual who can, at the time of the preparation of Form 1040—ES, reasonably anticipate that his gross income will be of such amount and character as to enable him to elect upon his return for such year to comput the tax under section 400 in lieu of the normal tax and surtax, the declaration of estimated tax may be made upon the basis set forth in section 400 and § 39.400-1. The filing of a declaration computed upon the basis of section 400 shall not constitute an election under section 402 and shall not permit the filing of a return under section 400 unless the taxpayer comes within the provisions of sections 400 and 401. For the purposes of computing the tax liability under chapter 1 in the case of married persons, if the net income of one spouse is determined without regard to the standard deduction, the standard deduction is not allowed to either. (See, however, § 39.23 (aa)-1 (c) for exceptions where spouses are legally separated or are not living together.) Hence, to avoid the risk of underestimating the tax in such case, one spouse should not use section 400 in computing the estimated tax unless the other spouse also uses section 400 or employs the standard deduction in computing the estimated tax.

(3) The declaration may be made by an agent if, by reason of illness, the person liable for making the declaration is unable to make it. The declaration may also be made by an agent if the taxpayer is unable to make the declaration by reason of continuous absence from the United States (including Puerto Rico as if a part of the United States) for a period of at least

60 days prior to the date prescribed by law for making the declaration. Whenever a declaration is made by an agent it must be accompanied by the prescribed power of attorney, Form 935, except that an agent holding a valid and subsisting general power of attorney authorizing him to represent his principal in making, executing and filing the declaration, may submit a certified copy thereof in lieu of the authorization on Form 935. The taxpayer and his agent, if any, are responsible for the declaration as made and incur liability for the penalties provided for erroneous, false, or fraudulent declarations.

(4) The home or residential address of the taxpayer (including the street and number, if any) shall be given in the space provided on the form. A taxpayer having a permanent business address may give that address as the principal or mailing address, provided that the complete home or residential address is also given within the space provided.

(b) Contents of declaration. The declaration shall contain (1) the amount estimated as the tax for the taxable year after the application of the credit for foreign tax, if any, but without regard to the credits under sections 32 and 35; (2) the amount estimated by the taxpayer as the sum of the credits under such section; and (3) the excess, if any, of the amount shown under (1) over the amount shown under (2), which excess shall be the estimated tax for such taxable year. The estimated tax need not include an amount estimated as the tax on self-employment income imposed by section 480.

26 U. S. Code Sec. 3689

Verification of returns: penalties of perjury.

(a) Penalties. Any person who willfully makes and subscribes any return, statement, or other document, which contains or its verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) Signature presumed correct. The fact that an individual's name is signed to a return, statement, or other document filed should be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

(c) Verification in lieu of oath. The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required. Added Aug. 27, 1949, c. 517, § 4(a), 63 Stat. 667.

Regulations 118, Code Sec. 41

§ 39.41-1 Computation of net income.

Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure

which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any required to return as additional income for the taxable year in which the change is made all the profit not theretofore returned as income pertaining to the payments due on installment sales contracts as of the close of the preceding taxable year.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 917

WARDE H. ERWIN AND MARY LOU ERWIN, PETITIONERS

v.

RALPH C. GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for certiorari in this case raises the question whether Section 58 of the Internal Revenue Code of 1939, which requires the filing of a declaration of estimated tax, is constitutional. Mandatory additions to tax for failure to file such a declaration were assessed against taxpayers, pursuant to Section 294 (d) (1) (A) of the Internal Revenue Code of 1939. The taxpayers did not file the required declaration and did not claim that a declaration was not required by the statute or that their failure to file was due to reasonable cause rather than wilful neglect.[1] The

[1] The District Court found that "there was no reasonable cause", and petitioners agree (Pet. 8). Through some error the word "no" was omitted from the District Court's findings as printed in the Petition (p. 26).

District Court (Pet. 24–28) and the Court of Appeals (Pet. 28–30) both held that Section 58 is a valid exercise of the taxing power.

That holding is in accord with *Walker* v. *United States*, 240 F. 2d 601 (C. A. 5), certiorari denied, 354 U. S. 939, in which one of the present taxpayers, as *amicus curiae*, made substantially the same arguments as are made here. As stated in the brief in opposition in the *Walker* case (No. 1033, October Term, 1956), there is no substantial doubt as to the constitutionality of the provisions relating to the estimated tax. Those provisions are part of the Congressional plan to put taxpayers on a pay-as-you-go basis; they were intended to supplement the withholding provisions of the Code by requiring current payment of tax on that income on which the tax could not, as a practical matter, be collected by withholding at the source. See H. Rep. No. 401, 78th Cong., 1st Sess., pp. 11–13, 32–39 (1943 Cum. Bull. 1283, 1290–1291, 1307–1312); S. Rep. No. 221, 78th Cong., 1st Sess., pp. 8–10, 35–43 (1943 Cum. Bull. 1314, 1319–1321, 1340–1346).

The provisions for withholding income tax at the source are constitutional as a proper exercise of the taxing power, *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1. It follows that the provisions requiring other installment payments of income tax are also constitutional. In either case the amount currently collected is based on an estimate of what the total tax will be. The provisions requiring the filing of a declaration of estimated tax (Code Section 58) and imposing additions to tax for failure to file such a declaration

(Code Section 294 (d) (1) (A)) are plainly designed to effectuate collection of the estimated tax. They, too, are valid, since Congress has broad discretion in establishing procedures by which its tax exactions may be made effective, *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619, and that discretion extends to the imposition of additional taxes by way of a civil sanction and to permitting such civil sanction to be imposed on the basis of facts determined by an administrative agency, *Helvering* v. *Mitchell*, 303 U. S. 391.

Aside from the express holdings in this and the *Walker* case, *supra*, (and see also, *Porth* v. *Brodrick*, 214 F. 2d 925 (C. A. 10)), it has repeatedly been assumed that the Code provisions relating to the estimated tax are constitutional. See, e. g., *Stephan* v. *Commissioner*, 197 F. 2d 712 (C. A. 5); *Coates* v. *Commissioner*, 234 F. 2d 459 (C. A. 8); *Clayton* v. *Commissioner*, decided January 25, 1956 (1956 P-H T. C. Memorandum Decisions, par. 56,021), affirmed, 245 F. 2d 238 (C. A. 6); *Fuller* v. *Commissioner*, 20 T. C. 308, affirmed on other grounds, 213 F. 2d 102 (C. A. 10); *Joyce* v. *Commissioner*, 25 T. C. 13; *Jones* v. *Commissioner*, 25 T. C. 1100; *Maxey* v. *Commissioner*, 26 T. C. 992. And compare the following cases upholding the constitutionality of provisions relating to the withholding of taxes: *Abney* v. *Campbell*, 206 F. 2d 836 (C. A. 5), certiorari denied, 346 U. S. 924; *Cain* v. *United States*, 211 F. 2d 375 (C. A. 5), certiorari denied, 347 U. S. 1013; *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.).

Thus, this case, like the prior *Walker* case, *supra*, presents no serious constitutional question. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1958.

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